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No. 88-1897

In The

# Supreme Court of the United States

October Term, 1989

DEPARTMENT OF STATE POLICE and
GERALD L. HOUGH, Director of the Michigan
Department of State Police,

*Petitioners,*

v.

RICK SITZ, JOSEPH F. YOUNG, SR.,
DOMINIC J. JACOBETTI, DICK ALLEN,
KEITH MUXLOW, and JACK WELBORN,

*Respondents.*

*On Writ Of Certiorari To The*
*Supreme Court For The State Of Michigan*

## BRIEF OF AMICUS CURIAE NATIONAL ORGANIZATION OF MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF PETITIONERS

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## MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The National Organization of Mothers Against Drunk Driving ("MADD") respectfully moves this Court for leave to file the accompaning Brief in this case as *amicus curiae*. The consent of the attorney for the Petitioners has been obtained and is on file with the Court, but the attorney for the Respondents has not consented to the filing of a brief by MADD as *amicus curiae*.

The applicant, MADD, has an interest in this case in that one of the primary reasons for the existence of MADD is to eliminate alcohol-impaired driving. This case is of critical importance to the achievement of that goal, in that it raises the issue of the constitutionality of a program of sobriety checkpoints carefully designed to minimize on-the-scene officer discretion and to comply with this Court's past decisions. MADD believes that such programs are the single most effective tool for protecting the public from drunk drivers, and should be upheld as reasonable and consistent with the Fourth Amendment to the United States Constitution.

The Petitioners herein, as well as Respondents, the trial court, and the Michigan Court of Appeals, agreed that the "correct test to be used to determine the constitutionality of the sobriety checkpoint plan" was the "three-prong balancing test" set forth in *Brown v. Texas*, 443 U.S. 47, 50-51 (1979). *Sitz v. Department of State Police*, 429 N.W2d 180, 182 (Mich. App. 1988). MADD believes that this standard is not applicable, and has been misapplied by the lower courts in any event. The proposed Brief sets forth what MADD believes to be the correct legal standard and burden of proof, and the appropriate application of that standard in light of the substantial published evidence relevant to the issues presented. If MADD's arguments are accepted by this Court, the decision of the court below must be reversed.



**WHEREFORE**, the National Organization of Mothers Against Drunk Driving respectfully requests that this motion be granted, and that leave be given to file the proposed Brief as *Amicus Curiae* in this cause.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys or record of all parties to the above cause in accordance with Rule 28, Supreme Court Rules, on this 15th day of November, 1989.

_____

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## BRIEF OF AMICUS CURIAE NATIONAL ORGANIZATION OF MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF PETITIONERS

## THE INTEREST OF AMICUS CURIAE

Mothers Against Drunk Driving ("MADD") was founded in May, 1980. Its mission statement speaks for itself:

> Mothers Against Drunk Driving mobilizes victims and their allies to establish the public conviction that impaired driving is unacceptable and criminal, in order to promote corresponding public policies, programs and personal accountability.

MADD exists for two reasons: to eliminate alcohol-impaired driving and to help meet the needs of the victims of drunk driving crimes.

In pursuit of these goals, MADD has participated actively in public and private studies, legislative initiatives, and law enforcement programs aimed at reducing the incidence of alcohol-related highway tragedies. MADD's extensive experience has convinced it that one of the most important and effective weapons in the war against drunk driving is the use of carefully designed sobriety checkpoints. The program adopted by the State of Michigan, after many years of study and close attention to this Court's legal decisions, is one of the very best in the nation. The Trial Court's holding[1] that Michigan's checkpoint program is unconstitutional jeopardizes the validity of all sobriety checkpoints on a nationwide basis, and therefore MADD's efforts to end the needless carnage on our nation's highways.

## SUMMARY OF FACTS

Michigan, like many other states, has worked throughout the 1980's to find effective tools to combat drunk driving. The Michigan Legislature in 1982 established a Drunk Driving Task Force, which recommended the implementation of sobriety checkpoints on public highways. Michigan's Governor in January, 1986, directed the Michigan Department of State Police to implement a sobriety checkpoint program. After careful study and consideration of the decisions of this Court, the State Police adopted specific and extensive guidelines to make sure that sobriety checkpoints were operated

[1] For ease of reference, MADD refers to the trial court and appellate opinions collectively as the "Trial Court" opinions. Specific page references are to the actual text of the trial court opinion, unless otherwise specified.



so as to minimize any intrusion upon law-abiding motorists and strictly limit officer discretion.

After these efforts, the State Police were ready to implement the program beginning on May 17, 1986. Before they could even do so, the Respondents sued them to enjoin the program, claiming that sobriety checkpoints would violate Respondents' Fourth Amendment rights. Respondents had not been stopped at any checkpoint, and alleged only that they are licensed Michigan drivers who "regularly travel throughout the state in their automobiles." Trial Court at 1.

The State Police operated a sobriety checkpoint at a single location at Dixie Highway and Gretchen Road in Saginaw County, Michigan, for approximately one hour and fifteen minutes on the night of May 17. One hundred and twenty-six vehicles passed through the checkpoint, with an average delay to motorists of twenty-five seconds or less. Two motorists were arrested for driving under the influence of alcohol.

The case was tried beginning twelve days later on May 29, 1986. After hearing evidence that alcohol contributes to twenty-five to fifty percent of motor vehicle deaths, the trial court held that Michigan had a "grave and legitimate state interest in curbing drunk driving." Trial Court at 26. It also found that the guidelines established to implement the program ensured that "on-the-scene officer's discretion relative to the operation of sobriety checkpoints will be minimal." Trial Court at 48.

The Trial Court nevertheless held that the State Police had not carried their burden of proving that the Michigan sobriety checkpoint program was the most "effective" means of combatting drunk driving, and found that such checkpoints had "the potential to generate fear and surprise" to motorists. The Trial Court therefore held that, under this Court's decision in *Brown v. Texas*, 443 U.S. 47 (1979), the entire Michigan sobriety checkpoint program violated the Fourth

Amendment and enjoined its operation. The Michigan Court of Appeals affirmed that judgment, and the Michigan Supreme Court denied further review. *Sitz v. Department of State Police*, 170 Mich. App. 433, 429 N.W.2d 180 (1988), *appeal denied*, 432 Mich. 879 (1989).

## SUMMARY OF ARGUMENT

The Trial Court improperly placed the burden of demonstrating the constitutionality of the sobriety checkpoint program on the Michigan Department of State Police ("State Police"). In evaluating the constitutionality of the sobriety checkpoint program, the Trial Court also incorrectly applied the three-pronged balancing test from *Brown v. Texas*, 443 U.S. 47 (1979). The appropriate standard for checkpoints is a two-part balancing test developed by those courts following this Court's decision in *Delaware v. Prouse*, 440 U.S. 648 (1979). That test weighs the state interest in conducting the limited checkpoint stop against the intrusion on individual liberty interests, where that intrusion is measured primarily by the amount of discretion exercised by the law enforcement officers operating the checkpoint. Because the Trial Court found that the state interest was strong and that officer discretion was minimal, application of the appropriate standard required that the Michigan program be upheld.

Alternatively, even if the test set forth in *Brown v. Texas* were applicable, the Trial Court misconstrued and misapplied that standard. The Trial Court erred in requiring the State Police to carry the burden of proving each and every element of the three-part "balancing test" articulated in *Brown v. Texas*. The Trial Court also improperly required the State Police to demonstrate through conclusive statistical evidence that the sobriety checkpoints were the single most effective law enforcement technique available.



The Trial Court further erred in invalidating the sobriety checkpoint program prematurely, and on the basis of an insufficiently developed factual record. Because the Michigan checkpoint program was in operation at only a single location for a total of one hour and fifteen minutes, the Trial Court had almost no experience with the actual operation of sobriety checkpoints in Michigan. Certainly, that experience was insufficient to justify the Trial Court's factual conclusions regarding the effectiveness or deterrent impact in Michigan of sobriety checkpoints operated accordingly to the specific guidelines of the Michigan program. Moreover, the Trial Court had no evidence whatsoever on which to base its conclusions regarding the "subjective fear and surprise" allegedly experienced by drivers at the checkpoint.

Finally, the Trial Court erred in relying heavily on the number of arrests as a key indicator of the effectiveness of sobriety checkpoint programs, and did not consider the substantial published evidence confirming the effectiveness of such programs. Published studies show that sobriety checkpoints are effective short-term and long-term methods for reducing the number of alcohol-related crashes (the ultimate goal of any DWI enforcement program). Similarly, studies have shown that sobriety checkpoint programs are perceived by the driving public as the most effective deterrent to drunk driving and that the use of such checkpoints is overwhelmingly supported by the public.

The Trial Court's substitution of its own views for the conclusions of the Michigan executive officials and the public on the relative effectiveness of sobriety checkpoints, as compared with other potential public safety policy choices, exceeded the appropriate role of the judiciary. Accordingly, the Trial Court's judgment should be reversed and the Michigan sobriety checkpoint program upheld.

## ARGUMENT

### I. THE TRIAL COURT IMPROPERLY PLACED ON THE STATE POLICE THE BURDEN OF DEMONSTRATING THE CONSTITUTIONALITY OF THE SOBRIETY CHECKPOINT PROGRAM.

The explicit effect of the Trial Court's holding was to enjoin the State Police from *ever* implementing a sobriety checkpoint program in the State of Michigan. Inherent in the Trial Court's ruling was a finding that the Michigan statute specifically permitting "temporary vehicle check lanes at appropriate locations throughout the state" to check for violations of law governing the use of public highways, MCLA 257.715(2), was unconstitutional on its face. The Trial Court's holding rested not on the specific guidelines promulgated by the State Police or on the circumstances of any individual "seizure," but instead on its sweeping conclusion that sobriety checkpoints have only a "minimal degree of effectiveness in curbing drunk driving." Trial Court at 53.

The Trial Court specifically held that the State Police had the burden of proving that the sobriety checkpoint program satisfied the Fourth Amendment by demonstrating:

> a) a legitimate state interest, b) that the checkpoints substantially furthered that interest; and c) that both the objective and subjective intrusion on an individual's liberty interest was minimal.

*Id.* at 52. The Trial Court's placement of the burden of proof upon the State Police thereby ignored the heavy presumption of validity assigned to any legislative act. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be



valid.") (challenge to Bail Reform Act); *National Railroad Passenger Corporation v. Atchison, Topeka and Santa Fe Railway Company*, 470 U.S. 451, 472 (1985) ("party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature acted in an arbitrary and irrational way.") Similarly, the actions of law enforcement officials are accompanied by a presumption of validity until and unless shown otherwise. *See, e.g., McDonald v. Board of Election*, 394 U.S. 802, 808-09 (1969); *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880).

The cases cited by the Trial Court[2] to support its imposition of the burden of proof on the State Police simply do not apply here. Each of those cases involved defendants who had been arrested at a sobriety checkpoint. Evidence derived from a search was to be used against them in a criminal prosecution. Respondents here are in no such jeopardy.

Not one of those opinions purported to find an entire state program of sobriety checkpoints invalid. MADD concedes that the state generally must show that evidence introduced against a defendant in a criminal prosecution was obtained lawfully. In order to have standing to challenge a particular search or seizure under the Fourth Amendment, however, an individual must have experienced the search or seizure at issue. *Alderman v. United States*, 394 U.S. 165, 171-174 (1969) ("Fourth Amendment rights are personal rights which, like

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[2] *Commonwealth v. McGeoghegan*, 449 N.E.2d 349, 353 (Mass. 1983) (dismissal of complaints for DWI sustained because particular roadblock lacked sufficient police presence, lighting, and advance warning); *State v. McLaughlin*, 471 N.E.2d 1125, 1142 (Ind. App. 1984) (suppression of evidence as to defendant arrested at roadblock sustained, but court specifically emphasized that its ruling did not invalidate use of sobriety checkpoints generally); *Webb v. State*, 695 S.W.2d 676, 677-78 (Tex. Crim. App. 1985) (conviction of defendant reversed because particular license check roadblock was a subterfuge for DWI checks).

some other constitutional rights, may not be vicariously asserted.")

Respondents did not and could not challenge any specific search or seizure, since none of them had encountered the one sobriety checkpoint operated by the State Police for an hour and fifteen minutes.[3] Therefore, Respondents challenged only the general statutory authorization for the use of sobriety checkpoints. If they have any right at all to contest the statute's validity, they necessarily bear the "heavy burden of proof" of demonstrating that it is unconstitutional. *Salerno*, 481 U.S. at 745. The Trial Court clearly erred in improperly placing this burden on the State Police.

## II. THE LOWER COURTS ERRONEOUSLY APPLIED BROWN V. TEXAS.

### A. The Existence of a Strong State Interest in Combatting Drunk Driving, Combined with Guidelines Strictly Confining the Discretion of the On-The-Scene Officer, is Sufficient to Establish the Constitutionality of Sobriety Checkpoints in Michigan.

This Court has considered the constitutional validity of checkpoints on a number of occasions beginning with *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). In that case, the Court upheld the constitutionality of checkpoints located near the border designed to apprehend illegal aliens. The Court distinguished such checkpoints from roving patrol car stops, *see United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), finding "the potential interference with legitimate traffic is

[3] Under *Barrows v. Jackson*, 346 U.S. 249, 255 (1953), "a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation." It therefore is doubtful that Respondents have standing to challenge the constitutionality of the Michigan sobriety checkpoints, either generally or as conducted in the limited model operation.



minimal . . . [and] checkpoint operations both appear to and actually involve less discretionary enforcement activity." 428 U.S. at 559. The Court concluded that the public interest in deterring violation of the immigration laws and the need for the use of checkpoints in that effort had been adequately demonstrated.

The checkpoint upheld in *Martinez-Fuerte* resulted in an apprehension rate of only .24 percent. *United States v. McFayden*, 865 F.2d 1306, 1313 (D.C. Cir. 1989). That is, of course, far less than the arrest rate in the limited actual experience with the Michigan sobriety checkpoint program (1.58 percent) or the reported experience with sobriety checkpoints in other states. Trial Court at 30-31. It was the "extremely low" arrest rate in Michigan, however, which the Trial Court found to be strong evidence of the "ineffectiveness" of the Michigan program. *Id.*

This Court revisited the checkpoint issue, albeit in dicta, in *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). Following the logic of *Brignoni-Ponce*, this Court held that random roving patrol stops to check for license and registration violations were unconstitutional. The Court reached that specific holding on the basis of its expressed concern about the potential for abuse resulting from extensive officer discretion. The Court emphasized the absence of such a concern in checkpoint stops, stating:

> This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.

The constitutionality of properly conducted roadblocks more recently was acknowledged by the Court in *Texas v. Brown*, 460 U.S. 730 (1983), in which the Court unanimously recognized that a roadway checkpoint for license and registration was a constitutionally permitted stop. Id. at 739. The

Court went on to hold, in a ruling unanimous in result but divided in reasoning, that a "plain-view" search resulting in the seizure of unlawful narcotics incident to the lawful roadblock "stop" was constitutionally valid.

MADD respectfully submits that *Prouse*, *Martinez-Fuerte*, and *Texas v. Brown* collectively establish that in assessing the constitutionality of roadblock stops of automobiles the appropriate test is to weigh the state interest to be served by the roadblock against the intrusion caused by the checkpoints. This is the test adopted by a number of state courts addressing this issue.[4] The Trial Court, however, inexplicably ignored *Texas v. Brown*, and appeared to be unaware of the sharp distinction that this Court has drawn between seizures conducted pursuant to discretionary police authority and checkpoints operated with minimal discretion.

The Trial Court's emphasis on the earlier decision in *Brown v. Texas* need not have led it into error. Immediately following its discussion of the balancing analysis that specifically cited *Prouse* and *Martinez-Fuerte*, this Court in *Brown v. Texas* set forth a standard which requires affirmation of the Michigan checkpoint program:

> To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.*

[4] *State v. Garcia*, 481 N.E.2d 148 (Ind. App. 1985); *Lowe v. Commonwealth*, 337 S.E.2d 273 (Va. 1986); *Commonwealth v. Trumble*, 483 N.E.2d 1102 (Mass. 1985); *State v. Golden*, 318 S.E.2d 693 (Ga. App. 1984). In addition, two states have upheld roadblock checkpoints simply citing the Court's language in *Prouse*. *Kinslow v. Commonwealth*, 660 S.W.2d 677, 678 (Ky. App. 1983); *State v. Goins*, 473 N.E.2d 1219, 1222 (Ohio App. 1984).



443 U.S. at 51 (emphasis supplied). *Brown v. Texas* is consistent with *Prouse* and *Martinez-Fuerte* in upholding limited checkpoint seizures justified by the public interest where the seizures are conducted pursuant to a plan embodying limitations on the discretion of individual officers.

The two-part balancing test for nondiscretionary seizures has been adopted by this Court in other contexts as well. In *Skinner v. Railway Labor Executives Association*, 109 S.Ct. 1402 (1989), this Court reversed a finding that the Federal Railroad Administration regulations requiring drug and alcohol testing of certain employees were unconstitutional. Citing *Prouse*, the Court stated:

> The permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

109 S.Ct. at 1414. The Court upheld the regulations, emphasizing the "standardized nature of the tests and the minimal discretion vested in those charged with administering the program . . ." *Id.* at 1415-1416. The Court found that the Government had a legitimate interest in taking "all necessary and reasonable regulatory steps to prevent or deter" employees from performing their tasks while impaired by drugs or alcohol. *Id.* at 1421.

This Court also recently sustained the constitutionality of a drug-testing program for certain Customs Service employees. *National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384 (1989). In an analysis equally pertinent to the Michigan sobriety checkpoints, and fatally inconsistent with the Trial Court's opinion, this Court wrote:

> The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. . . . Where, as

> here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.

109 S.Ct. at 1395. The Court outright rejected any test requiring statistical proof of the effectiveness of the program in producing arrests. *Id.* at 1396 n.3.

The Trial Court's findings on state interest and officer discretion alone are sufficient to establish the facial constitutionality of the Michigan sobriety checkpoint program.[5] The Trial Court's conclusion that the sobriety checkpoint program is not the most effective possible means of combatting the drunk driving problem, even if valid, does not justify invalidation of the Michigan statute. No one can deny, on the basis of the record herein or common sense, that sobriety checkpoints are at the very least one technique for arresting drunk drivers and deterring those who would otherwise drink and drive. Since the potential harm to the public is undeniably substantial, brief nondiscretionary stops to advance the state's public safety goals are justified.

### B. Proper Application Of The Balancing Test In *Brown v. Texas* Establishes The Validity Of The Michigan Checkpoint Program.

As stated above, MADD does not believe that the three-prong test in *Brown v. Texas* applies to non-discretionary automobile checkpoints. *Brown v. Texas* involved neither checkpoints nor automobiles. Instead, it addressed the constitutionality of a discretionary seizure and arrest of a pedestrian in an alleyway for failure to produce proof of identification. The facts in *Brown v. Texas* therefore implicated privacy and harassment concerns not presented by automobile checkpoints.

[5] MADD concedes that individual challenges to particular seizures based, for example, on departures from the standards imposed by the Guidelines could still be appropriate.



First, it long has been recognized that an individual has a lesser privacy interest in an automobile than in other contexts. *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1976). Thus, no "search" occurs when an officer examines the contents of an automobile through its windows, or open doors or trunk, see *Katz v. United States*, 389 U.S. 347 (1967), even when the view is made possible through the use of a flashlight. *See, e.g., United States v. Lee*, 274 U.S. 559 (1927). Similarly, the use of non-discretionary checkpoints simply does not invoke the potential for fear and surprise presented by the random stop of pedestrians or vehicles.

Even if the *Brown v. Texas* three-part balancing test were the appropriate test of the constitutionality of the Michigan program, it would require explicitly a "balancing" of the public and private interests implicated:

> The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends " 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers' " . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty . . ."

443 U.S. at 50-51 (citations omitted). The Trial Court, however, erroneously viewed the elements set forth in *Brown v. Texas* not as factors to be weighed in determining the reasonableness of the seizure, but instead as multiple independent requirements, *each* of which had to be met by the State Police. It stated:

> It is incumbent on defendants to show a) a legitimate state interest, b) that the checkpoints substantially furthered that interest, and c) that both the objective and subjective intrusion on an individual's liberty interest was minimal.

Trial Court at 52.

Despite finding that the State's interest was a strong one and that the objective intrusion on the individual was minimal, Trial Court at 26, 48, the Trial Court concluded that "defendants have failed in their burden of proof" because the evidence showed only "a minimal degree of effectiveness in curbing drunk driving" and that the subjective intrusion on the individual as a result of "potential fear and surprise" was substantial. The Trial Court's failure to engage in any "balancing" of these findings was additional error on its part.

**C. The Trial Court Erroneously Required The State Police To Prove That Sobriety Checkpoints Are More "Effective" Than Any Less Intrusive Law Enforcement Technique.**

The Trial Court not only required the State Police to provide evidence that sobriety checkpoints would produce results that would *significantly*[6] further the articulated state interest, but further required the State Police to prove that no alternative means would be more successful.[7] The Trial Court unequivocally held that it was not enough for the State

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[6] The Trial Court specifically rejected uncontroverted evidence that demonstrated some arrests, some deterrence and some short-term beneficial impact from sobriety checkpoint programs as insufficient to uphold the Michigan program. Trial Court at 32-36.

[7] Indeed, the Trial Court discounted as insignificant evidence that sobriety checkpoint programs in conjunction with other law enforcement initiatives reduced the incidence of DUI accidents because there was no showing as to the impact of the checkpoint aspects of the program alone. Trial Court at 32-36.



Police to show that sobriety checkpoints were a reasonable means to achieve the State's goal:

> Accordingly, the Court finds those cases noted above which base their result on merely whether the police have a reasonable plan-not persuasive [sic] . . .

Trial Court at 24.

Indeed, it appears that the Trial Court required the State Police to prove that there were *no* other means of achieving the articulated goal. It stated:

> The Court . . . lastly examines the extent to which there is no practical alternative means available to the State to advance its interest other than by implementing sobriety checkpoints.

Trial Court at 38. The Trial Court also held that the inquiry depends on:

> examining the degree to which it can be said that there are not permissible alternative means available to the police which advance the particular state concern.

Trial Court at 27.

No prior court has ever sanctioned a "*no* alternative" approach to assessing the constitutional reasonableness of searches and seizures. Even the "less intrusive" or "less restrictive alternative" analysis has been rejected by courts considering the propriety of sobriety checkpoints. *Commonwealth v. Shields*, 521 N.E.2d 987, 990 (Mass. 1988) ("Less intrusive alternative analysis traditionally has not been employed in determining the constitutional reasonableness of searches and seizures.").

The *Shields* view is fully supported by a long line of cases from this Court. *See United States v. Sharpe*, 470 U.S. 686, 686-687 (1985) ("A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative

means by which the objectives of the police might have been accomplished. . . . The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize it or to pursue it."); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973). The Trial Court simply ignored the fact that, in evaluating the constitutionality of checkpoints, this Court specifically rejected a less restrictive means analysis in *Martinez-Fuerte*:

> The logic of such elaborate less-restrictive alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizures powers.

428 U.S. 556 at n.12. Earlier this year, the Court reiterated its rejection of that technique in *Skinner*, 109 S.Ct. at 1419, n.9. Accordingly, it is apparent that the Trial Court erred in this additional respect.

### D. The Evidence Presented To The Trial Court Was Insufficient To Support The Invalidation Of Sobriety Checkpoints In Michigan.

In its ruling, the trial court effectively substituted its own policy views for the considered conclusions of the Michigan Legislature, Governor, and task forces of experts appointed to address the public safety threat of drunk driving. The task forces that ultimately recommended the use of sobriety checkpoints and structured the detailed guidelines for their implementation spent years in their studies. Their considered opinions and recommendations were rejected by the trial court on the basis of a limited record adduced over the space of a week on the basis of less than two hours actual experience with the Michigan sobriety checkpoint program.

This exceeds the appropriate judicial role as delineated in decision after decision of this Court. Here, as in this Court's recent decision in *Skinner*, there was an invitation to judicial activism that would, "at bottom," require the Court "to



second-guess the reasonable conclusions drawn by [public officials] after years of investigation and study." 109 S.Ct. at 1419 n.9. This Court in *Skinner* declined that invitation. The Trial Court here did not, and thereby erred.

The existence of a strong state interest in reducing the staggering number of deaths and injuries caused by drunk driving has been acknowledged throughout these proceedings. The trial court, even on the limited record presented, had ample uncontroverted evidence from which any reasonable person would conclude that sobriety checkpoints do result in arrests of some drunk drivers and do deter others. Although, the duration of the deterrent effect and the cost/benefit impact of sobriety checkpoints as contrasted with other forms of enforcement were questioned by some witnesses, the State Police presented substantial evidence that the number of DUI incidents had decreased in areas that had used sobriety checkpoints.[8]

While ignoring or discounting the evidence offered by the State Police, the Trial Court made a critical finding based on nothing more solid than its own speculation about human reactions. The opponents of the Michigan program presented *no* direct evidence that the checkpoints actually did or would "generate fear and surprise to motorists." The Trial Court nevertheless made such a finding, and then jumped to its conclusion that the "subjective" intrusion on motorists from the checkpoints was "substantial". Trial Court at 54.

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[8] This evidence was partly discounted by the trial court because of the existence of other deterrent programs in those areas and partly because of the trial court's fixation on the number of arrests as the critical factual justification for the program. Trial Court at 32-36. In fact, as set forth *infra* at 23-24, a far more important and meaningful statistical measure is the reduction in DUI-related accidents.

Even on the "effectiveness" issue, the evidence presented by the opponents of the program was inconclusive. For example, the testimony as to the supposed short-lived nature of the deterrent effect presumed a subsequent cessation of the program. No evidence was presented that the ongoing checkpoint programs planned by the State Police would not maintain, or even increase, the beneficial short-term impact. Indeed, as discussed *infra* at 25-26, studies do support the long-term deterrent impact of regularly maintained checkpoint programs.

There was simply no evidence that sobriety checkpoints do *not* reduce DUI related crashes. Viewing the record most favorably to Respondents, the evidence was that empirical studies from other states neither conclusively prove or disprove the beneficial impact of sobriety checkpoints on DUI related crashes. The very limited opportunity for sobriety checkpoints in Michigan obviously precluded any reliable conclusions on this issue based on actual experience with the conditions in that State.

The Trial Court's holding was tragically wrong not only because it struck down a valid and badly needed law enforcement program, but also because of the stultifying effect it would have on state law enforcement initiatives in general. If upheld, it would place the states in an intolerable "Catch 22" situation, wholly at odds with our system of federalism. According to such a holding, a state may *commence* a law enforcement program involving "seizures less intrusive than traditional arrests" only if it can first present convincing proof that the program will be more effective in achieving the public interest objective than other methods. Since no such factual showing can be made without having substantial experience in operating such a program, the states are largely precluded from implementing new and innovative programs to address the increasing public safety challenges they face.



Plainly, that has never been and never should be the law of the United States. The essential folly of the Trial Court's logic was recognized by the California Supreme Court in rejecting a challenge to sobriety checkpoints:

> The experience both in California and in other states with sobriety checkpoints has been very limited, and no definitive statistics are available. It would be presumptuous in the extreme for this court to prohibit the use of an otherwise permissible and potentially effective procedure merely because its effectiveness is at the present time largely untested. Indeed, to do so would prevent the compilation of any data to show its effectiveness.

*Ingersoll v. Palmer*, 743 P.2d 1299, 1311-1312 (Cal. 1987). Reversal of the judgment in this case therefore is essential to the encouragement of innovative efforts by the states to protect their citizens from crime.

### E. The Trial Court Incorrectly Focused On Arrest Numbers As The Measure Of The Effectiveness Of Sobriety Checkpoints.

The Trial Court selected an inappropriate measure — number of arrests — as the primary criterion of the effectiveness of the sobriety checkpoint program. The simple fact is that a "low" number of arrests can be interpreted plausibly to support diametrically opposed conclusions. If arrests are low, one can conclude that the enforcement program was ineffective in identifying and arresting lawbreakers. However, an equally reasonable conclusion from the same fact is that the program was highly effective in deterring the unlawful conduct. The ultimate goal of any enforcement program should be to reduce the number of drunk drivers and thereby reduce the number of alcohol-related deaths and injuries. The success of any program, therefore, should be judged on

its potential to achieve that ultimate goal and not on the inconclusive measure relied on by the Trial Court.

The fallacy of the Trial Court's approach was recognized by this Court earlier this year in *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1395. In response to the argument that the employee drug testing program was unreasonable because it had detected only 5 drug users of 3600 employees tested, the Court noted:

> The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, see *Camara v. Municipal Court*, 387 U.S. 523 (1967), and of motorists who are stopped at the checkpoints we approved in *United States v. Martinez-Fuerte*, 428 U.S. 343 (1976).

The Court noted that the Government's airport screening program had detected only 42,000 firearms after screening over 9.5 billion persons and over 10 billion pieces of luggage, and stated:

> When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success. *See Bell v. Wolfish*, 441 U.S. 520, 559 (1970).

109 S.Ct. at 1396 n.3.

The evidence presented to the Trial Court established that "the purpose of the checkpoints would be primarily to deter, and only secondarily, to apprehend drunk drivers." Trial Court at 10. Moreover, the trial court had before it testimony



that sobriety checkpoints do deter drunk driving (see testimony of Lt. Cotton described in Trial Court at 32) and data relied upon by other courts finding a deterrent effect from checkpoints. *See Ingersoll*, 743 P.2d at 1311-1312; *People v. Scott*, 473 N.E.2d 1, 5-6 (N.Y. 1984); *State v. Superior Court*, 691 P.2d 1073, 1077 (Ariz. 1984). Because the number of arrests in the brief Michigan experience was, in the Trial Court's view, "low," it logically should have concluded that the program — including the publicity that was specified in the Guidelines — had been effective in achieving that primary objective of deterrence. The Trial Court's myopic focus on actual arrests, however, led it to the erroneous opposite conclusion that the program was ineffective.

### F. The Trial Court Ignored Evidence From Reported Cases That Supported The Use Of Sobriety Checkpoints.

The Trial Court recognized that the Michigan sobriety checkpoint program was "largely modelled on the Maryland plan." Trial Court at 10. The Trial Court also discussed the legal standards applied in the reported cases addressing the constitutionality of sobriety checkpoints, including *Little v. State*, 479 A.2d 903, 913 (Md. 1984). Trial Court at 14. However, the Trial Court ignored the critical factual findings made by the Maryland Supreme Court in holding the Maryland program constitutional.

Evaluating a program substantially identical to the Michigan program, the Maryland Supreme Court found:

> The record before us demonstrates that for the limited period of its operation, the sobriety checkpoint program has been a moderately effective technique for detecting and deterring the drunk driver .... Of greater significance is the evidence in the record indicating that the pilot program had a substantial impact on the drunk driving problem. Police attending the checkpoints found

> that many drunk individuals asked a sober spouse or companion to drive instead. Taxi companies reported a substantial increase in business from intoxicated persons who had been deterred from driving.

Other cases expressly considered by the Trial Court also provided evidence supporting the use of sobriety checkpoints. In *State v. Superior Court*, 691 P.2d 1073, 1076-77 (Ariz. 1984), the Arizona Supreme Court found that the police had

> introduced statistics that the percentage of injuries that were alcohol-related from September to December 1983 was between 9 and 11.5. From 1 December to 8 December this percentage was also 11.5. That number fell to 8 percent after the roadblock was instituted. This drop is particularly significant in light of the fact that a high percentage of alcohol related accidents traditionally occur in December.

The New York Court of Appeals also had recognized the evidentiary support for the effectiveness of sobriety checkpoints:

> The value of roadblocks in decreasing drunk driving is attested by both the United States Department of Transportation and the Governor's Alcohol and Highway Safety Task Force. A 1983 paper on Safety Checkpoints for DWI Enforcement issued by the Department of Transportation's National Highway Traffic Safety Administration's Office of Alcohol Countermeasures emphasizes the importance of informing the public about DWI checkpoint operations as the chief means of deterring driving while intoxicated (id., at p. 26), and the Governor's Task Force found 'that the systematic, constitutionally conducted traffic checkpoint is the single most effective action in raising the community's perception of the risk of being detected and apprehended for drunk driving' (Report, at p. 103).



*People v. Scott*, 473 N.E.2d 1, 4-5 (N.Y. 1984). Again, the Trial Court expressly noted the New York decision but was blind to its findings. Trial Court at 14.

## III. CURRENTLY AVAILABLE PUBLISHED EVIDENCE DEMONSTRATES THE EFFECTIVENESS OF SOBRIETY CHECKPOINT PROGRAMS.

As set forth above, MADD firmly believes that the Trial Court's strong emphasis on actual arrest rates, standing alone, was misplaced. Nevertheless, even judged by actual arrests alone, there is strong evidence that sobriety checkpoints are effective. Most studies indicate that, at checkpoints geared toward arrest[9], between one and two percent of the drivers interviewed will be arrested. This statistic is confirmed by the very limited actual experience in Michigan.[10]

To properly assess any arrest rate, however, one must first consider that studies indicate that the number of drivers on the road during high-risk weekend nights with a blood alcohol content ("BAC") in excess of the legal limit is between three and five percent[11]. Thus, one would expect to encounter at a checkpoint operated at such times only three to five such drivers per one hundred. If one to two percent of the drivers who arrive at such a checkpoint are arrested, that

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[9] Some checkpoints, such as the Michigan checkpoint, are geared principally to deterring drunk driving by maximizing the number of persons encountering officers at the checkpoint.

[10] Two of the one hundred and twenty-six drivers through the checkpoint were arrested.

[11] Wolfe, "Characteristics of Alcohol-Impaired Drivers" presented at Automobile Engineering Meeting, Society of Automotive Engineers.

may represent an arrest rate of twenty to fifty percent or more of the drunk drivers. By way of contrast, the actual probability of arrest for a driver with a BAC in excess of the legal limit during an intensive roving patrol enforcement program is only one in two hundred.[12] Thus, the actual arrest rate at sobriety checkpoints is far higher than that achieved through roving patrols.

Sobriety checkpoints also are more efficient in terms of officer time per arrest. In a study conducted in Charlottesville, Virginia,[13] traditional DWI patrols required almost eight hours per officer for each arrest, whereas checkpoints resulted in one arrest per less than seven officer hours. Similar results were observed in a report by the Transportation Safety Board evaluating the traditional and checkpoint programs in New Jersey[14].

In addition to efficiencies in manpower required to effect arrests, checkpoints are more effective in both deterring and arresting the drivers who are legally intoxicated, but who do not have BACs greatly in excess of the legal limit. This significant benefit was recognized in *Commonwealth v. Tarbert*, 535 A.2d 1035, 1042 (Pa. 1987). Upholding sobriety checkpoints, the Pennsylvania Supreme Court said:

> A 1984 safety study by the National Transportation Safety Board indicated that without sobriety checkpoint programs, many alcohol impaired drivers believe they

[12] Beitel, Sharp and Glauz, "Probability of Arrest While Driving Under the Influence of Alcohol," *Journal of Studies of Alcohol* 36: 237-256 (1975).

[13] Voas, Rhodenier and Lynn, *Evaluation of the Charlottesville Checkpoint Operations*. Report DOT-HS-806-989, National Highway Traffic Safety Administration, Washington, D.C. (1985)

[14] Levy, Shea and Asch, "A Further Assessment of DWI Programs in New Jersey." Office of Highway Safety, Trenton, N.J. (1987)



> can avoid police detection by driving carefully. However, with the use of sobriety checkpoints, the general public's perception of the probability of detection and sanction is increased. [This] public perception has a strong basis in fact. While those drunk drivers arrested by roving patrols average a .169 to .20 blood alcohol content (BAC) level, drunk drivers arrested at Delaware sobriety checkpoints averaged a .14 BAC level. In light of the fact that a driver with a .10 BAC level has a six times greater likelihood of causing an accident than a sober driver, the effectiveness of sobriety checkpoints in detecting and removing drunk drivers with dangerous but significantly lower BAC levels is significant.

Of even greater importance, sobriety checkpoint programs have demonstrated both short-term and long-term reductions in the incidence of alcohol-related accidents. Reductions of various lengths have been demonstrated in studies conducted in Charlottesville, Virginia;[15] Clearwater, Florida;[16] Bergen County, New Jersey;[17] and Arizona[18]. The Charlottesville study reported a ten to thirteen percent reduction in alcohol-related crashes. The Clearwater study reported a twelve percent reduction in alcohol-related crashes. The Bergen County study reported reductions of ten to fifteen percent in single vehicle nighttime alcohol-related crashes during the first two years of the checkpoint program and as much as a

[15] Baas, *et al. supra.*

[16] Lacey, *Enforcement and Public Information Strategies for DWI General Deterrence: The Clearwater and Largo, FL Experience.* Report DOR-HE-807-066, National Highway Traffic Safety Administration, Washington, D.C. (1986)

[17] Levy, *supra.*

[18] Epperlein, "The Use of Sobriety Checkpoints as a Deterrent: An Impact Assessment," State of Arizona Analysis Center, Phoenix, AZ. (1985)

twenty-nine percent decrease in subsequent years. The Arizona study also reported significant reductions in alcohol-related crashes following implementation of the checkpoint program.

Perhaps the most comprehensive study of the long-term effect of sobriety checkpoints comes from New South Wales, the most populous area in Australia.[19] Nearly one-third of the population there is exposed to sobriety checkpoint operations each year. Following implementation of the checkpoint operations, alcohol-related fatal crashes fell by more than thirty percent and have remained at that reduced level for four to five years.

The trial court also ignored available evidence regarding the subjective impact of sobriety checkpoints. Surveys conducted in Charlottesville and Blacksburg, Virginia demonstrated that the public strongly supported checkpoints. Indeed, eighty-seven percent of the nighttime drivers in Charlottesville (the group specifically impacted by the checkpoints) either strongly supported or somewhat approved the use of checkpoints. Interestingly, the support for checkpoints was stronger in Charlottesville, where checkpoints were in use, than in Blacksburg where no checkpoints were used.[20] Generally speaking, surveyed drivers over-

[19] Homel, Carseldine and Kearns "Drink-drive countermeasures in Australia. *Alcohol, Drugs and Driving* 113-144 (1988).

[20] Although interesting, this result is hardly surprising. It supports the common sense view that whatever fear or concern the public may have regarding checkpoints is lessened as the public actually experiences and becomes familiar with their operation.



whelmingly approve of the use of sobriety checkpoints to reduce alcohol-related fatal crashes.[21]

The polls therefore negate the Trial Court's unsupported conclusion that "the checkpoints sought to be implemented in this case do have the potential for generating significant degrees of surprise and fear in motorists passing through them." Trial Court at 51. Public polls favoring sobriety checkpoints strongly indicate that they generally will be met with relief and welcome rather than "fear and surprise." Moreover, any "fear and surprise" will diminish over time as the driving public becomes familiar with sobriety checkpoints — at least if they are allowed to operate for more than an hour and fifteen minutes.

Not only does the public favor sobriety checkpoints, but it also recognizes those checkpoints as effective. Numerous surveys have concluded that checkpoints are noticed more by the public, particularly drinking drivers, than any other enforcement technique.[22] The public believes that sobriety checkpoints result in a higher probability of arrest than other techniques.[23] In Clearwater and Largo, Florida, where checkpoints were employed, survey respondents were significantly more aware of recent increases in DWI enforcement than respondents in Sarasota and Bradenton, where checkpoints were not used. A study conducted in Massachusetts and New Hampshire found that residents in areas using roadblocks

[21] Hingson, "1987 Massachusetts/New Hampshire Road Block Surveys," Governor's Highway Safety Bureau, Boston, Massachusetts (1987); Voas, *supra*; Baker, "Roadside Sobriety Checkpoint Operations in the District of Columbia," Presentation at Lifesavers/6, Boston, MA (1988).

[22] Lacey, *supra*; Hingson, *supra*; Williams and Lund, "Deterrent Effects of Checkpoints on Drinking and Driving," Insurance Institute for Highway Safety, Washington, D.C. (1984)

[23] Lacey, *supra*; Hingson, *supra*; Williams and Lund, *supra*.

were much less likely to drive after drinking than residents in areas employing only roving patrols. Residents in both states felt that checkpoints would produce greater declines in drunk driving than roving patrols.[24]

Another poll contrasted residents of Fairfax County, Virginia (a county with intense DWI enforcement effort, but no checkpoints) with Montgomery County, Maryland (a lower level of DWI enforcement, but use of checkpoints). Residents of both Fairfax and Montgomery Counties felt that the probability of being arrested was greater in Montgomery County than Fairfax County.[25] The same poll also compared residents of seven Delaware counties using checkpoints with nearby eastern Maryland counties not using checkpoints. As with Fairfax and Montgomery Counties, drunk driving arrests were perceived to be significantly more likely in the Delaware counties employing checkpoints than in the Maryland counties using only traditional methods.

If the "effectiveness" of sobriety checkpoints is indeed at issue in applying the Fourth Amendment, the overwhelming consensus of informed opinion on that subject cannot be ignored. Michigan is by no means unique in its conclusion that sobriety checkpoints are a vital component in the arsenal to combat drunk driving. Sobriety checkpoints have been advocated by virtually every expert body to address the issue. In 1983, the Presidential Commission on Drunk Driving[26] recommended sobriety checkpoints to increase the public's perception of the risk of apprehension for DUI. In 1984, the National Transportation Safety Board recommended that all

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[24] Hingson, *supra*.

[25] Williams and Lund, *supra*.

[26] Presidential Commission on Drunk Driving *Final Report*. Available from the National Commission Against Drunk Driving, Washington, D.C. (1983).



states implement or expand the operation of sobriety checkpoints.[27] Numerous other organizations also support the use of sobriety checkpoints to save lives.[28]

## CONCLUSION

MADD respectfully submits that difficult public policy judgments as to the "effectiveness" of law enforcement programs are properly left to the legislatures and executive officials of the states, and not to ad hoc judicial decrees. The Fourth Amendment is satisfied when the state interest is strong, the objective intrusion from the checkpoint is minimal, and the discretion of the officers is carefully controlled. Under the Trial Court's findings, and in fact, the Michigan program clearly met these standards. Michigan, and other states, should now be freed from judicial hyper-scrutiny and given the chance to develop and refine this important tool for

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[27] National Transportation Safety Board, *Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocation*. NTSB/55-84/01, Washington, D.C. (1984).

[28] *See, e.g.*, the National Safety Council, the International Association of Chiefs of Police, the Insurance Institute for Highway Safety and others.

achieving the most crucial goal of government: protecting the lives and safety of their citizens.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Rule 28, Supreme Court Rules, on this 15th day of November, 1989.

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# AMICUS CURIAE

# BRIEF

MOTION FILED
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No. 88-1897

# In The
# Supreme Court of the United States
(October, 1989 Term)

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,
*Petitioners,*

-v-

RICK SITZ, JOSEPH F. YOUNG, SR. DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,
*Respondents.*

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## ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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## AMICUS CURIAE BRIEF OF MICHIGAN STATE CHAPTERS OF MOTHERS AGAINST DRUNK DRIVING (MADD) SUPPORTING SOBRIETY CHECKPOINTS

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## REFERENCES

The Michigan State Chapters of MADD relied on the following references when preparing this Brief:


1) *Evaluation of Charlottesville Checkpoint Operations*, DOT HS 806 989, Final Report, (May, 1985).

2) *Enforcement and Public information Strategies for DWI Deterrence; Arrest Drunk Driving — The Clearwater and Largo, Florida Experience*, DOT HS 807 066, Final Report, (December, 1986).

3) *Drink-Driving Countermeasures in Australia*, R. Homel, et al; *Alcohol, Drugs and Driving*, Vol. 4, No. 2; pp 113–144 (1988).

4) *The Influence Of Alcohol Countermeasures In Changing Drink Driving Attitudes*: G.W. Trinca; Asia-Pacific Journal of Public Health, Vol. 2, No. 1; Jan. 1987.

## ISSUE PRESENTED

## WHETHER OR NOT THE MICHIGAN SOBRIETY CHECKPOINT PROGRAM IS A CONSTITUTIONAL SEARCH AND SEIZURE.

The Michigan State Chapters of Mothers Against Drunk Driving (MADD) say "Yes."

## AMICUS CURIAE BRIEF OF MICHIGAN STATE CHAPTERS OF MOTHERS AGAINST DRUNK DRIVING (MADD) SUPPORTING SOBRIETY CHECKPOINTS

The Michigan State Chapters of MADD, with the consent of all parties involved, file the following Amicus Curiae Brief in support of the Michigan Sobriety Checkpoints.

## I.

## STATEMENT OF INTEREST

The Michigan State Chapters of MADD incorporate by reference the Michigan Attorney General's (MAG) legal arguments. The purpose of this Amicus Curiae Brief is to support the MAG's legal argument and counter the findings of Michigan's Courts by addressing statistically the effectiveness, deterrence and lack of intrusiveness of checkpoints.

MADD was founded in May, 1980 primarily to remove drunk drivers from the road by forcing the legal and enforcement systems to deal more effectively and appropriately with the drunk driver, reduce the numbers of deaths and injuries caused by drunk driving, and to provide support to the victims of drunk driving crashes.

MADD has long advocated the position of the deterrence model in social science which states that a threat will be more powerful if it is certain, severe and closely related in

time to its object. We believe that the continued and unabated pressure to identify drunk drivers prior to serious crashes by effective, constitutional methods will persuade others not to drink and drive. One such method is the sobriety checkpoint program utilized in Michigan.

Evidence for the effectiveness of sobriety checkpoints may be found in the study of the Charlottesville, Virginia checkpoint program, which the National Highway Traffic Safety Administration (NHTSA) funded.

## II.

## ARGUMENT

Although the Michigan State Chapters of MADD will rely on the MAG's legal arguments, a brief discussion of law is appropriate to set the stage for the remainder of this Brief. First, The Michigan State Chapters of MADD agree that the correct constitutional test is found in *Brown* v *Texas*, 443 U.S. 47 (1979). At 443 U.S. 47, 50–51, the Court stated:

> "The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizures advance the public interest and the severity of interference with individual liberty."

The Michigan Trial Court and Court of Appeals in the instant case therefore used the three-pronged *Brown, supra*, test:

1. State interest
2. Effectiveness
3. Intrusiveness



With respect to "state interest," the Trial Court in the instant case held, at page 26 of its Opinion, that the carnage and devastation caused by drunk driving were known, and that "there is a grave and legitimate State interest in curbing drunk driving." The parties to this litigation agreed, and "state interest" is therefore not an issue before this Supreme Court.

However, with respect to effectiveness, the Michigan Trial Court stated at page 42 of its Opinion:

> "In summary of the foregoing, the Court finds that sobriety checkpoints are not an effective means to apprehend drunk drivers, that such checkpoints do not have any long-term deterrent effect, and that there exists alternative means available to the Defendants in their effort to curb drunk driving."

Finally, with regard to intrusiveness, the Trial Court concluded at page 51 of its Opinion, that:

> "The Court thereby finds that sobriety checkpoints of the type which are contemplated by defendants' plan do have a significant subjective intrusive impact on a person's liberty interests."

This Amicus Curiae Brief addresses these latter two Michigan Trial Court holdings regarding effectiveness and intrusiveness.

### A. THE CHARLOTTESVILLE, VIRGINIA CHECKPOINT OPERATIONS

In 1983–84, NHTSA sponsored a sobriety checkpoint program in Charlottesville, Virginia through a grant from the Virginia Office of Highway Safety. [*Evaluation of Charlottesville Checkpoint Operations, R. Voas, et al; DOT HW 806 989 — Final Report (May, 1985)*] The checkpoint operation lasted from December 20, 1983 to December 31, 1984. This study demonstrated that a checkpoint program, when carefully planned, is an effective, minimally intrusive method of apprehending drunk drivers exceeding the effectiveness of traditional, random police patrols. Clearly, the checkpoint operation increased the public's perception that if you drink and drive, you would more than likely be caught.

During the year-long operation, 94 checkpoints were conducted involving almost 24,000 drivers being stopped the interviewed. A procedural manual was developed and used to insure that checkpoints would be in accord with Federal and State Court decisions. (Evaluation of Charlottesville Checkpoint Operations, supra, p 3) Checkpoint sites were selected on the basis of the occurrence of alcohol-related crashes. (Id, p 3)

The procedures manual strictly defined individual officer discretion as required by the courts. (Id, p 3) During the initial contact, the officer stated the purpose of the stop, requested the driver to produce his/her license, and observed the driver for signs and symptoms he/she had been drinking. (Id, p 4) The interview varied from 20 to 60 seconds depending upon the traffic flow, questions asked by the driver, and the time it took the driver to produce the driver's license. (Id, p 4) After the interview, the driver was waived on, unless a valid license was not produced or the officer suspected the driver had been drinking. (Id, p 4) If he/she failed to produce a valid license or was suspected to have been drinking, the driver was invited to move his vehicle to a safe, off-road location nearby where the second phase of the investigation was conducted. (Id, p 4)

At the off-road location, the driver's license status was checked by radio, and the officer conducted sobriety tests. (Id, p 4) If the driver was found to be impaired, he/she was cited for impaired or drunken driving (i.e., DUI). The Charlottesville procedures were substantially similar to those developed by the Michigan State Police. Michigan's procedures are set forth in detail in the MAG's Brief.

### B. EFFECTIVENESS OF CHARLOTTESVILLE CHECKPOINTS

One measure of checkpoint effectiveness is the arrest productivity compared with that of alternative, traditional, random patrols. For the time period stated above, the Charlottesville checkpoints were in operation 4 hours per night, 94 total nights and 1,880 actual officer hours. They produced 290 DUI arrests, averaging one arrest per every 6.5 officers hours.



By comparison, the traditional DUI patrol which was studied in Charlottesville from January 1, 1983 through October 31, 1983, was in operation 4 hours per night, for 79 nights, involving a total of 632 officer hours. It produced 80 DUI arrests or approximately 1 arrest per 7.9 officer hours.

The productivity rate of 1 arrest per 6.5 officer hours demonstrated that checkpoints were more productive at identifying drunk drivers than the traditional DUI patrol. Further, if arrests can be assumed the benchmark of effectiveness, and, therefore, success, then checkpoints were more effective and productive than traditional patrols.

In the Charlottesville and Michigan checkpoint experiences, 1% of the drivers who were stopped at the checkpoints were arrested for DUI. The Michigan Trial Court found this measure of effectiveness was minimal. However, this U.S. Supreme Court has reviewed other checkpoint-type cases in which the rate of so-called effectiveness was lower than the sobriety checkpoints, and which *were held constitutional*. In *National Treasury Employees Union* v *Von Raab*, 57 USLW 4338 (1989), only five employees out of 3,600 (i.e., .139%) tested positive for drugs. In *Skinner* v *Railway Labor Executives Association*, 57 USLW 4324 (1989), breath, urine and blood testing for drugs and alcohol resulted in positive findings in slightly more than .1% of the tests. In footnote 3 of *National Treasury Employees Union*, *supra*, in which airport searches were discussed, only 42,000 firearms out of approximately 19.5 billion searches were produced. That was an "effectiveness" rating of .0002%. Finally, in *United States* v *Martinez-Fuerte*, 428 US 543 (1976), only 171 vehicles out of 146,000 (i.e., .117%) searched revealed deportable, illegal aliens at checkpoints. Given the grave and legitimate state interest in curbing drunk driving, comparable to and exceeding any public interest in the above cited cases, the Charlottesville and Michigan rates of effectiveness compel a review of the lower Courts' findings.

A much more important measure of checkpoint effectiveness is reduced alcohol related crashes. In Charlottesville, several measures of alcohol related crashes were examined,

and reductions in these ranged 8%–15%. The number of HBD (Had Been Drinking) vehicle crashes, for example, fell 15% in 1984 compared to the 1981–1983 period. Analysis indicated that HBD crashes were reduced by an average of 2.56 crashes per month during the checkpoint program period from the period preceding the program's implementation. Statistics indicated there were less than 5 chances in 100 that this reduction could have occurred by chance. There was also an 8% decline in the number of nighthour accidents, but this was not considered statistically significant. (Id, p 45)

Statistical tests were also employed to determine whether the reduction in alcohol related crashes in 1984 was lower than would have been expected from an overall downward trend in such crashes which existed before the initiation of the checkpoint program. Those tests revealed there were less than 2 chances in 100 that the magnitude of the reduction was due to weather, economic or other chance factors.

As a result, the researchers concluded that the checkpoint program was effective in reducing crashes related to drunken driving by approximately 10%.

### C. DETERRENCE OF CHARLOTTESVILLE CHECKPOINT PROGRAM

Although the arrest productivity of checkpoints is as high or higher than other police patrols, the Michigan State Chapters of MADD contend that the effectiveness of checkpoints depends not so much on the number of drunk drivers arrested and convicted for their crimes, but by the public's *perceived* risk of apprehension.

To determine the effect of the checkpoint program in Charlottesville on the *perception* of the probability of arrest, a random telephone poll was conducted of 218 Charlottesville area residents who, because they drank and drove at night, were considered to be candidates for a checkpoint stop. When called, 79.3% of the Charlottesville group reported



it was somewhat or much more likely they might be arrested for DUI than it had been one year earlier before checkpoint operations. Almost half of those who reported an increase in arrest risk stated that checkpoints were the reason why arrest was more likely.

This poll also indicated that 1 in 4 of these *at risk* drivers had been stopped at a checkpoint, and half had seen a checkpoint in operation. This demonstrates the extent to which checkpoints create public awareness, a requirement which experts agree is essential to the success of any enforcement program.

These statistics contradict the Michigan Trial Court's conclusions that checkpoints do not deter drunk drivers.

### D. INTRUSION OF CHARLOTTESVILLE CHECKPOINT PROGRAM

The next element of the *Brown, supra*, case which the Michigan Trial Court addressed was whether or not the Michigan checkpoint procedure involved unreasonable interference with the motorist's freedom to travel within the state. The Court found that objective interference was minimal, because the checkpoint generally involved a 30 second interview (Trial Court Opinion, p 43). Therefore, the issue became whether or not the checkpoints generated unreasonable subjective intrusion, in terms of its potential to create surprise and fear among the public, and in terms of untempered discretion among the police with regard to the stopping of individual vehicles.

With respect to officer discretion, the Trial Court stated, at page 51 of its Opinion:

> "The Court also finds that the discretion of the police in operating such checkpoints and determining their location is severely limited."

Thus, the primary remaining issue was whether or not the checkpoints potentially generated unreasonable subjective surprise and fear among unimpaired drivers. The Trial Court concluded that the Michigan checkpoint had "a significant subjective intrusive impact on a person's liberty interest." (Trial Court Opinion, pp 51–52).

The Michigan State Chapters of MADD feel the Trial Court erred in the latter holding. To begin with, checkpoint operations required posting of signs advising motorists of checkpoint operations. Secondly, the operations involved were lighted, safe locations manned by uniformed officers. Thirdly, officers immediately informed motorists of the checkpoint's purpose. Fourthly, procedures concerning stopping and questining were in writing, thereby limiting police discretion. As a result of these protections, a vast majority of motorists who passed through approved of them.

Next, the Charlottesville checkpoint follow-up telephone polling is instructive also. These telephone polls of public reactions to checkpoints in Charlottesville, and in neighboring Blacksburg, Virginia where no checkpoints were set up, firmly rebut the belief that they created significant fear and demonstrated that the public strongly supported checkpoints.

The question asked of the so-defined *at risk* driver was: "With regard to the use of sobriety checkpoints, do you — strongly approve, somewhat approve, somewhat disapprove, strongly disapprove of their use?" 87% of Charlottesville drivers who were most at risk of being stopped at a checkpoint approved this type of operation compared to 78% of similar drivers in Blacksburg, Virginia where there was no risk of being stopped at a checkpoint. Thus, familiarity and comfort with checkpoints increased their approval rating among those who have the most to fear from them! (Evaluation of Charlottesville Checkpoint Operations, p 32)

The Michigan State Chapters of MADD believe that these polls' results hint at something larger than mere public approval.



They indicate the public, especially those most at risk of being apprehended, is morally outraged with drunk driving, and the checkpoints are the focus of such moral deterrence.

At the other extreme, is the very drunk driver. If he is so drunk that he attempts to run a checkpoint, then he will suffer no fear or surprise, or any other appropriate emotion. Obviously, this person must be removed from the roads, and these checkpoints would help effectuate this purpose.

The only one who may suffer fear and surprise is the vehicle driver who has been drinking but still possesses some degree of ratiocination — he may seek to escape the checkpoint. If that occurs, then strategically placed State Police Troopers will stop and, if over the limit, arrest those whose driving behavior provides reason to believe they are impaired by alcohol. Under such circumstances, there will be "probable cause" to require an alcohol test before arresting the drunk driver. In any event, the Charlottesville researchers concluded that checkpoints generated virtually no subjective surprise and fear among the motorists passing through them.

## E. THE AUSTRALIAN EXPERIENCE

Prior to implementing roadside checkpoints, the Australian drinking and driving problem was similar to that of the United States. There, alcohol abuse was the single most important factor contributing to road crash deaths and injuries "where solid drinking by the majority of the community is normal behavior" (The Influence of Alcohol . . . p 42). In 1982, New South Wales, Australia developed a drinking and driving control package featuring *random breath testing* (RBT), (i.e., sobriety checkpoints). (Id, p 42) Although a difference between the Australian checkpoints and those in the United States involved their randomness, a primary factor which contributed to their potential for impact was that they were conducted frequently over a substantial portion (i.e., ⅓) of the population.

Traffic crash data for the New South Wales, Australia checkpoint experience details the impact of RBT (*Drink-Driving Countermeasures In Australia*, R. Homel, et al; *Alcohol, Drugs and Driving*, Vol. 4, No. 2). Before the introduction of RBT, vehicle crash counts in New South Wales were stable for approximately 5 years, with the average number of fatal crashes each week at about 22.12. In the 5 years after RBT began, this average dropped 22% to 17.23. (Drink-Driving Counter Measures . . . p 132). Alcohol-related fatal crashes for 5 years before RBT averaged 13.43 per week. By the 4th year after the implementation of RBT, this average dropped 35% to 8.67 per week.

Further, in the 3 year period before RBT, the average number of drivers and riders killed with a blood alcohol concentration (BAC) of .05g% or more was 4.36 per week; however, in the 4 years after RBT was introduced, this average dropped 36% to 2.81 per week.

These figures refute the Michigan Courts' conclusions and respondents' contentions in this case on two points: First, the statistics show that sobriety checkpoints were effective in reducing alcohol-related crashes. Secondly, they showed that deterrence is long-term if the checkpoints were administered on a long-term basis with full commitment of the law.

Also interesting was the perception of the risk of apprehension (Drink-Driving Countermeasures . . . pp 134 and 135). A series of questionnaire surveys were conducted in New South Wales asking two questions:

(1) Did the respondents consider their present chances of being charged for drink-driving different than before RBT?

2) Did the respondents think there was anything they could do to reduce their chances of being stopped at an RBT station?

To the first of these questions, 76% of the respondents said their chances of being charged was higher or much higher during the first RBT (1982) survey. In a later (1984)



survey, the proportion increased to 87%, and in 1987, it was 86%. Further, the proportion of respondents who said "much higher" increased from 26% in 1983 to 40% in 1984, to 44% in 1987.

As to the second question, the proportion of respondents who answered "yes" that they could do something to reduce their chances of being stopped fell from 33% in 1982, to 27% in 1984, to 24% in 1987. These statistics provide compelling evidence that the public perceived checkpoints as being so effective that there was little or nothing that could be done to avoid them. Therefore, the statistics revealed long-term deterrence, as well as the public's rather immediate comfort with checkpoints.

Another important conclusion drawn by those studying the Austrailian Experience was that sobriety checkpoints increased the public's awareness of the moral culpability of an habitual drunk driver (Drink-Driving Countermeasures . . . p 138). Respondents to the above surveys reported an increasing and highly negative opinion of the drunk driver involved in a crash from 77% in 1982 to 86% in 1987. Likewise, there was an increasingly critical opinion of the drunk drivers stopped by police, rising from 63% in 1982 to 71% in 1987.

Finally, the surveys showed that support for RBT grew substantially in New South Wales after its introduction in 1982 (Drink-Driving Countermeasures . . . p 138). In 1982, 64% of the respondents indicated their support, 85% in 1983, to 97% in 1987. These statistics, consistent with those of the Charlottesville, Virginia checkpoint program, reveal virtual universal support for checkpoints and what they represent. Also, they reveal the weakness in the Michigan Courts' rulings and respondents' contention that checkpoints engender subjective fear and surprise, because it would be patently contradictory for nearly 100% of the survey respondents support checkpoints and at the same time fear them.

In short, the Australian experience not only increased awareness and proved to be an effective long-term deterrence to

drunk driving, but also changed the consciousness of the people who were most affected by it. Thus, the checkpoints achieved moral deterrence.

## SUMMARY OF ARGUMENTS

The Michigan checkpoint program was generally similar to that in Charlottesville, Virginia, which showed clearly a significant impact in reducing alcohol related crashes and increasing productivity in apprehending drunk drivers. Further, Charlottesville demonstrated that a sustained checkpoint program increases the public awareness of the drunk driving problem and, of more specific relevance to deterrence, the perceived risk of arrest among drinking drivers.

The studies demonstrated 80%–90% of the public favors checkpoints, and the experience with them adds to their approval rating, and comfort level. Further indication of acceptance was that out of approximately 24,000 vehicles passing through the checkpoints in Charlottesville, only 9 drivers failed to stop.

The checkpoints were not only effective, but efficient in that 6.5 man hours were invested per DUI arrests at the checkpoints, as compared to 7.9 hours expended under the traditional, random patrol.

To the issue of long-term versus short-term deterrence, there is no question but that the Charlottesville checkpoints reduced alcohol related crashes 8% to 15% during the year the checkpoints were in operation compared to the prior three years.

While the impact of the Charlottesville program lasted for the year it was in place, the evidence for long-term effects is limited in this country, because few programs have been in place for an extended period. However, the Australian experience between 1977 and 1984 showed a fall in alcohol-related casualties from 39% to 25% of all automobile crashes. This indicates that a sustained checkpoint program will produce long-term results.



The Michigan Courts have imposed a catch-22 situation by ruling that, based on an incomplete record at the Trial Court level, checkpoints were not effective in the long-term. If this Supreme Court upholds the Michigan decisions, there will be no opportunities to collect new evidence on checkpoints anywhere in the United States. Simply, without evidence, there will be no checkpoints. Without checkpoints, there will be no new evidence, and on and on.

Finally, the Charlottesville and Michigan experiences show that the subjective level of intrusion is minimal, since the public strongly supports the checkpoint programs, the operations involved adequate warning to the public, uniformed officers operating in well lighted safe conditions and limited officer discretion.

## IV.

## CONCLUSION

The Michigan State Chapters of MADD's existence presumes that drunk driving is controllable. If it is effectively controlled, then as many as one-half of all fatalities in auto crashes could be avoided. Billions of dollars each year would be saved. The spillover into other areas of our national consciousness is bound to enhance our quality of life.

The Michigan State Chapters of MADD ask this Honorable Court to grant the following relief:

**A. Reverse the Michigan Courts' rulings, and hold the Sobriety Checkpoint in Michigan is a constitutional search; and,**

**B. Allow counsel for the Michigan State Chapters of MADD a few moments to argue its position orally.**

Respectfully submitted by,

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